Tenaga Nasional Bhd v Chong Ching Food Supply

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–141 OF 2010
LAU BEE LAN J
30 OCTOBER 2013

Public Utilities — Electricity — Charges for electricity — Recovery of unbilled usage of electricity for five years — Claim for losses resulting from meter tampering — Whether claim brought pursuant to s 38(3) of the Electricity Supply Act 1990 — Whether there was tampering resulting in under recording of electricity consumption — Whether quantum of loss of revenue suffered by plaintiff established — Whether plaintiff entitled to recover loss of revenue — Whether proviso to sub-reg 11(2) of the Licensee Regulations 1990 applied — Electricity Supply Act 1990 ss 37 & 38 — Licensee Supply Regulations 1990 reg 11

The plaintiff's claim against the defendant was for the sum of RM367,711.39 being unrecorded electricity charges for the period between 2000 to 2005 to the defendant's premises at Spring Crest Industrial Park, Batu Caves ('the said premises'). The plaintiff contended that the meter had been tampered with and it was not recording the actual unit of usage for the said period. The defendant however denied the tampering of the meter; that the defendant did not witness the inspection and was not informed of the result of the inspection after it was carried out and that the allegation of tampering had not been proven. The defendant's alternative submission was that any retrospective adjustment shall not exceed three months from the date the consumer had been informed about being undercharged or overcharged. The defendant relied on the proviso to reg 11 of the Licensee Supply Regulations 1990 ('the Regulations'). The issues for the determination of this court, inter alia, was whether there was tampering of the meter at the said premises and whether the meter at the said premises had not been recording the actual unit of usage.

Held, allowing the plaintiff's claim with costs of RM10,000:

(1) DW1, a director of the defendant company, had signed P1 (Borang Pemeriksaan Meter LPC Voltan Rendah) which had been filled with all the remarks and notations on his accord. This was consistent with SP1's evidence that P9 (*Surat Pemberitahuan Pengambilan Bahan-Bahan Bukti*) was not signed since he had chosen to go for lunch despite being told that of the same. There was no merit in the defendant's submission that the examination of the meters were done in the absence of the defendant's management, servants or agents; and the fact that SP1 did not sign the undated P9 bears testimony of the fact that the items removed were never shown since he had gone for lunch at the material time (see paras 15–16).

(2) As the plaintiff did not challenge the accuracy of the calculation made by SP2 therefore, the defendant was liable for the payment of the said sum. The recovery of the loss of revenue by the plaintiff from the defendant was made possible vide s 38(3) of the Electricity Supply Act 1990 ('the Act'). Further, reg 11(2) of the Regulations was not applicable to a case of meter tampering ie 'an offence under s 37(3) of the Act and the claim for loss of revenue arising therefrom' (see paras 23 & 24).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk wang sejumlah RM367,711.39 sebagai caj elektrik yang tidak direkodkan untuk tempoh antara 2000 hingga 2005 kepada premis defendan Spring Crest Industrial Park, Batu Caves ('premis tersebut'). Plaintif berhujah bahawa meter telah diusik dan ia tidak merekodkan unit penggunaan sebenar untuk tempoh tersebut. Defendan walau bagaimanapun menafikan pengusikan meter; bahawa defendan tidak menyaksikan pemeriksaan dan tidak diberitahu keputusan pemeriksaan selepas ia dijalankan dan bahawa dakwaan pengusikan tidak dibuktikan. Penghujahan alternatif defendan adalah bahawa apa-apa pelarasan retrospektif tidak akan melebihi tiga bulan dari tarikh pengguna telah diberitahu mengenai kurang caj atau terlebih caj. Defendan bergantung ke atas peruntukan kepada peraturan 11 Peraturan-Peraturan Bekalan Pemegang Lesen 1990 ('Peraturan-Peraturan'). Isu-isu untuk penentuan mahkamah ini, antara lain, adalah sama ada terdapat pengusikan meter di premis tersebut dan sama ada meter di premis tersebut tidak merekodkan unit penggunaan sebenar.

Diputuskan, membenarkan tuntutan plaintif dengan kos sebanyak RM10,000:

(1) DW1, pengarah syarikat defendan, telah menandatangan P1 (*Borang Pemeriksaan Meter LPC Voltan Rendah*) yang mana telah dipenuhi dengan kesemua kenyataan dan notasi atas persetujuannya. Ini adalah konsisten dengan keterangan SP1 bahawa P9 (*Surat Pemberitahuan Pengambilan Bahan-Bahan Bukti*) tidak ditandatangani memandangkan dia memilih untuk pergi makan tengahari walaupun diberitahu mengenainya. Tiada merit dalam penghujahan defendan bahawa pemerikasaan meter dibuat dalam ketiadaan pengurusan, pekerja atau ejen defendan; dan fakta menunjukkan bahawa SP1 tidak menandatangani P9 yang tidak bertarikh tersebut mengandungi keterangan fakta bahawa item yang dikeluarkan tidak pernah ditunjukkan memandangkan dia keluar untuk makan tengahari pada masa material (lihat perenggan 15–16).

(2) Memandangkan plaintif tidak mencabar ketepatan pengiraan yang dibuat oleh SP2 oleh itu, defendan bertanggungjawab untuk pembayaran jumlah tersebut. Pemerolehan semula kerugian hasil oleh

plaintif daripada defendan boleh dibuat melalui s 38(3) Akta Bekalan Elektrik 1990 ('Akta'). Selanjutnya, peraturan 11(2) Peraturan tidak digunapakai kepada kes pengusikan meter iaitu 'an offence under s 37(3) of the Act and the claim for loss of revenue arising therefrom' (lihat perenggan 23 & 24).]

Notes

For cases on charges for electricity, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2237–2240.

Cases referred to

Francis Phillips a/l AJ Phillips v Bank Industri Malaysia Bhd [2004] 2 MLJ 1, CA (refd)

Tenaga Nasional Berhad v Wong Kwi Fong Mahkamah Rayuan Rayuan Sivil No W-02–2901 of 2010 (unreported), CA (refd)

Tenaga Nasional Bhd v Arkitek Urbanisma Sdn Bhd [2011] 10 CLJ 796, HC (refd)

Tenaga Nasional Bhd v Bright Rims Manufacturing Sdn Bhd [2011] 8 MLJ 455; [2011] 1 LNS 45, HC (refd)

Legislation referred to

Electricity Supply Act 1990 ss 2, 37(3), 38(1), (3), (4), (5)

Licensee Supply Regulations 1990 reg 11, 11(2)(a), (b), (c), (d), (e), (f)

Ankit Sanghvi (Shearn Delamore & Co) for the plaintiff.
Ramesh Sivakumar (Ramesh & Loo) for the defendant.

Lau Bee Lan J:

BACKGROUND

[1] The plaintiff's claim against the defendant is for the sum of RM367,711.39 being unrecorded electricity charges for the period 20 January 2000 to 6 January 2005. The plaintiff contended that the meter had been tampered with and it was not recording the actual unit of usage for the said period.

[2] The defendant denied the tampering of the meter; that the defendant did not witness the inspection and was not informed of the result of the inspection after it was carried out and that the allegation of tampering has not been proven.

[3] It is not disputed that the plaintiff has been supplying electricity to the defendant at premises No 62, Spring Crest Industrial Park, Jalan 2/1 OB, 68100 Batu Caves, Selangor Darul Ehsan ('the said premises') since 1992

under a contract for supply of electricity dated 28 August 1992 (exh D14, bundle B pp 64–66). Further, the defendant is a client of the plaintiff with the registered consumer account No 01220000082810.

ISSUES

[4] The parties had agreed on the issues as follows:

(a) sama ada kesemua dan segala pertikaian yang berbangkit diantara plaintif dan defendan berhubung kesempurnaan dan/atau ketidaksempurnaan meter elektrik tersebut telah dirujuk dan diselesaikan secara bersama dan muktamad oleh plaintif dan defendan pada 22 January 2002 tanpa pengakuan liability.

(b) sama ada plaintif adalah dihalang oleh had masa (limitation) dan Regulation 11(2) Licensee Supply Regulations 1990 untuk mengemukakan suatu tuntutan ganti rugi sebanyak RM367,711.39 terhadap defendan yang dikira dari 20 Januari 2000 hingga 6 Januari 2005 (secara retrospective);

(c) sama ada plaintif adalah diestop daripada mempertikaikan ketidaksempurnaan meter bekalan elektrik tersebut pada 17 Januari 2005 dan mengemukakan satu ganti rugi yang dikira dari 20 Januari 2000 hingga 6 Januari 2005;

(d) sama ada kakitangan plaintif ada hadir dan melakukan pemeriksaan pada meter di premis No 62, Spring Crest Industrial Park, Jalan 2/10B, 68100 Batu Caves, Selangor Darul Ehsan pada 17 January 2005 dengan disaksikan oleh wakil defendan;

(e) sama ada meter di premis No 62, Spring Cresh Industrial Park, Jalan 2/10B, 68100 Batu Caves, Selangor Darul Ehsan telah diusik dan/atau diubahsuai dan/atau diganggu oleh defendan.;

(f) sama ada ketidaksempurnaan meter tersebut disebabkan oleh faktor luaran yang tidak ada kena mengena dengan defendan; dan

(g) sama ada meter di premis tersebut telah gagal merekodkan bacaan yang tepat selaras dengan bekalan elektrik yang dibekalkan oleh plaintif kepada defendan.

[5] Based on the evidence led at the trial and the defendant's submission, I am of the view that items 1, 2, 3 and 6 have been abandoned by the defendant. Further, I am of the view the primary issues are items 4, 5 and 7 which can be broadly categorised as follows:

(a) whether there is tampering of the meter at the said premises?

(b) whether the meter at the said premises has not been recording the actual unit of usage?

FINDINGS

Whether there is tampering of the meter at the said premises?

[6] Based on the evidence of SP1, Johan bin Sikandar, the senior level technician, TNB, the court finds an inspection has been carried out at the said premises on 17 January 2005 by SP1 together with Abdul Aziz bin Abdul Rahman and Syed Barkabah bin Syed Abdullah. The irregularities detected by SP1 are as follows (Q and A6 WSSP1):

Q : Apakah penemuan usul yang diperolehi sewaktu pemeriksaan dijalankan?

A : Sewaktu pemeriksaan dijalankan, kami telah menemui beberapa kejanggalan yang adalah amat ketara. Kejanggalan-kejanggalan tersebut adalah seperti berikut:

(a) Seal yang lazimnya terdapat di Terminal Test Blok (TTB) telahpun diusik. Kami telah mendapati bahawa Seal tersebut telahpun dikacip dengan plier bukan TNB (Sila rujuk kepada ms 3 Ikatan Dokumen Tambahan Bersama (C), Gambarajah P2A dan 2B). Tambahan pula, kami juga telah mendapati bahawa terdapatnya kesan penggunaan bekas clamp dan glu pada TTB (sila rujuk kepada ms 2 C, Gambarajah P3A dan P3B);

(b) Seal yang lazimnya terdapat di fuse carrier telahpun diusik. Kami telah mendapati bahawa Seal tersebut juga telahpun dikacip dengan plier bukan TNB (sila rujuk kepada ms 3 P4, Gambarajah 9); dan

(c) Sambungan pada wayar fasa kuning yang didapati dibelakang TTB berada dalam keadaan longgar (sila rujuk kepada ms 4 C, Gambarajah 12). Ini menyebabkan kewujudan ketiadaan y pulse (sila rujuk kepada ms 5 C, Gambarajah 14).

[7] According to SP1, the irregularities were recorded in P1 which was signed by DW1, Mr Lam Kam Yeon, a director of the defendant company.

[8] SP1 testified that an accuracy test has been conducted on the meter at the said premises and it was found that the meter was giving a 'ralat' (error) of 67% which means the meter has not been recording the actual rate of consumption of electricity and the monthly bills was 67% and under billed (Q & A 11-13 WSSP1).

[9] SP1 further testified that rectification works were carried out on the meter at the defendant's premises whereby a subsequent accuracy test has been conducted on the meter which revealed there was a material increase in the reading of the meter (Q & A 14 WSSP1). The evidence of SP1 is supported by the photographs wherein P7A—C, bundle C p7 labelled 'setelah pembetulan'

confirms there is an increase in reading of the meter when compared to P6, bundle C p 5 labelled 'sebelum pembetulan'.

[10] SP1's evidence is supported by contemporaneous evidence in the form of *Borang Pemeriksaan Meter LPC Voltan Rendah* (P1, bundle B pp 74–75) and *Surat Pemberitahuan Pengambilan Bahan-Bahan Bukti* (D9, bundle B p 77).

[11] The effect of the cross-examination of SP1 with respect to para 3.3 of P1 under heading 'Keadaan Pepasangan' to show that the defendant could not have tampered with the meter and the defendant could not be faulted for any irregularity is in my view laid to rest when SP1 clarified in re-examination:

> Q : Encik Johan telah sebentar tadi disoal oleh peguamcara defendan berkenaan dengan keadaan pepasangan di perenggan 3.3 ms 74, iaitu exhibit P1, dan encik Johan telah menjelaskan bahawa meter, sticker dan CT berada dalam keadaan baik. Encik Johan juga telah seterusnya menyatakan bahawa pepasangan adalah bermaksud 'fixing'. Soalan saya encik adalah sama ada terdapat perbezaan di antara 'pepasangan' (fixing) dengan 'kejituan' (accuracy)?
>
> A : Ya.
>
> Q : Encik Johan telah menyatakan bahawa ada perbezaan antara kejituan dan pepasangan. Apakah perbezaannya yang dimaksudkan itu?
>
> A : Kejituannya boleh didapati di ms 75, pada pengiraan yang terdapat ditajuk4.4, ujian kejituan.
>
> Q : Maksudnya, adakah bacaan pada meter defendan jitu atau tidak jitu?
>
> A : Tidak jitu.

[12] The terminal test block and the fuse were found to have been tampered with as stated in para 3.3 of P1.

[13] During cross-examination SP1 stated the *'wayar kuning menyebabkan kelonggaran'* and relied on his record of *'kejanggalan'* at P1 p 75 bundle B. The defendant denied tampering with the wires and contended *'SP1 did not say that the wires were switched'* but *'merely said the wires were loose'*; and *'wires may become loose over the years due to various factors and this cannot be attributed to the defendant in the absence of evidence.'*

[14] With respect I disagreed with the defendant's submission as it is wholly speculative. From the vigorous cross-examination of SP1 it is evident that SP1

maintained from the inspection conducted, there was evidence of tampering as can be seen from the flow of the questions posed to him (SP1)

(a) S : Setuju atau tidak bahawa tidak didapati apa-apa usikan, ubahsuai atau pun gangguan terhadap komponen dalaman TTB?

J : Tak setuju;

(b) S : Ada tak kamu ada bukti di Mahkamah yang menunjukkan komponen dalam TTB diganggu, diusik atau diubahsuai?

J : Dalam Ikatan C ms 4 gambar P5 di mana menunjukkan wayar fasa kuning di TTB telah diusik dan dilonggarkan;

(c) S : Catatan siasatan di ms 74. Lihat bahagian TTB — adakah dikatakan wayar fasa kuning di TTB diusik dan dilonggarkan?

J : Pada ms 74 ta' dinyatakan;

(d) S : Katakan ta' dinyatakan di ms 74 sebab ta' ada apa-apa bukti usikan/gangguan/ubahsuai pada komponen TTB?

J : Pada komponen TTB saya ta' setuju;

S : Kalau betul wayar fasa kuning, ia sebenarnya longgar, bukan ia di tukar?

J : Setuju, longgar, ta' ditukar.

(e) S : Setuju atau tidak wayar fasa kuning termasuk sambungan adalah wayar asal TNB?

J : Setuju.;

(f) S : Setuju atau tidak wayar itu ta' tukar atau diubahsuai?

J : Setuju melainkan ada usikan; and

(g) S : Lihat dokumen-dokumen di Mahkamah dimanakah keterangan yang diberikan yang dia yang menyebabkan kelonggaran?

J : Ada keterangan bertulis di ms 75 Ikatan B di Bahagian 5. Catitan Kejanggalan. Saya terangkan kepada saksi, Lam Kam Yeon apa yang berlaku kejanggalan di pepasangan tersebut:

(a) seal TTB diusik;

(b) seal fius PT (Pitential Transformer) diusik;

(c) TTB ada bekas clamp (High Risk TOE (Type of Electricity);

(d) yellow (phase) pulse tiada (wire yellow Y0 phase penyambung belakang TTB longgar); dan

(e) didapati Test Blok TTB ada kesan glue.

[15] It is this court's finding that DW1 had signed P1 which had been filled with all the remarks and notations on his accord. This is consistent with SP1's evidence that P9 was not signed since he had chosen to go for lunch despite being told that of the same.

[16] On a balance of probabilities, in the light of my findings above, with respect I find there is no merit in the defendant's submission that the examination of the meters were done in the absence of the defendant's management, servants or agents; and the fact that SP1 did not sign the undated D9 bears testimony of the fact that the items removed were never shown since he has gone for lunch at the material time.

[17] Pursuant to the inspection conducted, the plaintiff had issued the written statement/letter of demand dated 21 March 2005 (P8, bundle B p 67) which is titled 'Kes Penggunaan Elektrik Secara Curang' to the defendant to inform them of the tampering of the meter. The defendant has been in receipt of the same which expressly states that the meter at the said premises had been found to be tampered with. The material parts of the said letter is reproduced:

> Perkara di atas adalah dirujuk.
>
> Merujuk kepada pemeriksaan dan pengujian pepasangan meter yang dilakukan oleh TNB di premis tuan pada 17 Januari 05, maka telah mendapati bahawa pepasangan TNB *telah diusik*.
>
> Akibat dari pengusikan pepasangan tersebut, meter gagal merekodkan bacaan yang sebenar sejajar dengan elektrik yang dibekalkan. Menurut seksyen 38(3) Akta Bekalan Elektrik 1990:
>
> Pemegang lesen boleh menghendaki pengguna membayar kepadanya apa-apa hasil yang disebabkan oleh kesalahan yang dilakukan di bawah seksyen 37(1), 37(3) dan 37(14) dan apa-apa perbelanjaan yang dilakukan oleh pemegang lesen dibawah seksyen ini termasuk perbelanjaan yang dilakukan berkenaan dengan penyambungan semula bekalan.
>
> Maka *kami dengan ini menuntut* pihak tuan membuat *pembayaran sebanyak RM367,711.39* dalam tempoh 14 (empat belas) hari dari surat ini.
>
> (Emphasis added.)

[18] The defendant did not respond to the said letter which resulted in the plaintiff filing this action against the defendant for recovery of the outstanding sum owed.

Whether the meter at the said premises has not been recording the actual unit of usage?

[19] The sole witness for the defendant, Mr Lam Kam Yeon ('DW1'),

testified in examination in chief that (i) the meter affixed to the said premises in 1992 was an old mechanical meter which was replaced with the new digital electrical meter, P6 and P7A, P7B & P7C; (ii) the change in the meter took place sometime in 27 February 2004 via a meter replacement programme which was implemented in recent years. Following this, DW1 disputed the plaintiffs claim for malfunction to the meter reading from 20 January 2000 to 6 January 2005.

[20] I cannot accept the contention of the defendant firstly, because it is not part of the defence, ie not pleaded and therefore not an issue to be tried. It was raised for the first time in DW1's witness statement, (WSDW1, Q and A(s) 7, 8, 9, 10 and 11).

[21] Secondly, the oral evidence of SD1 is not supported by any documentary proof. Although SP1 agreed in cross-examination that TNB conducted a programme for meter replacement on 18 January 2004 and the last inspection for P6 was 27 February 2004, however SP1 could not say for certain that P6 was fixed at the said premises approximately around 27 February 2004. In addition there is evidence from SP2 there has been no replacement of defendant's meter for the period 20 January 2000 to 6 January 2005. Even if the court is to discount IDP13, the reading history of the defendant's meter, there is the evidence of SP2, Puan Salmah binti Abdul Samat, the administrative assistant attached to TNB that *'jenis bacaan 'N' menunjukkan bacaan yang dibuat secara Normal. Dan jenis bacaan 'E' menunjukkan bacaan yang dibuat secara Estimate, anggaran. Sekiranya terhadap sebarang penukaran jangka pada masa tersebut, jenis bacaan akan ditanda sebagai 'R' yang mewakili Replacement'*. SP2 who prepared P10A and P10B, the document called 'Pembilan Kes Kecurian Arus (KKA)' testified there was no reading of 'R' for the period 20 January 2000 to 6 January 2005. SP2 further testified that the plaintiff's claim was for RM367,711.39 after taking into account the cost of operation of RM750 and the claim was for the period of 20 January 2000 to 6 January 2005. According to SP2's evidence in chief, the computation was as follows:

(a) tempoh ini diperolehi dengan meneliti graf pada ms 72 IDP11 di mana didapati penurunan bacaan yang ketara pada 20 January 2000 dan tarikh akhir tempoh diambil adalah pada 6 Januari 2005;

(b) ralat yang digunakan bagi kes ini adalah — 67.00% yang merupakan ralat yang dicadangkan bagi pengiraan bil kebelakang. Saya telah merujuk kepada Ulasan Teknikal yang boleh dilihati di ms 73 IDP12 untuk memperolehi ralat tersebut;

(c) formula yang saya gunakan adalah Unit (KWH) dibil darab 100 dan dibahagikan 33.00%.

Unit (KWH) Dibil = Jumlah (KWH) Sebenar
x 100
33.00%";

(d) peratusan 33.00% diperolehi apabila ralat 67.00% ditolak daripada 100%;

(e) jadual ini (P10A dan P10B) menunjukkan bagaimana pengiraan semula bil terkurang dilakukan. Apabila 'Jumlah KWH Sebenar' diperolehi dengan menggunakan formula yang dinyatakan sebelum ini, pihak TNB boleh membuat pengiraan untuk memperolehi 'Jumlah KWH Terkurang Dibil'. Jumlah ini adalah perbezaan jumlah di antara 'Jumlah KWH Sebenar' dengan 'Jumlah KWH Dibil';

(f) jumlah bagi 'Amaun Terkurang Dibil' boleh diperolehi apabila 'Unit KWH Terkurang Dibilkan' didarabkan dengan kadar tarif yang digunakan.;

(g) kadar tarif yang digunakan adalah RM0.288 seunit; and

(h) ini adalah berdasarkan kadar tarif yang ditetapkan oleh Kerajaan Malaysia.

[22] I am mindful of the fact that the 'graf' (IDP11) and the 'Ulasan Teknikal' (IDP12) referred to in SP2's evidence remained ID documents at the conclusion of trial and were not marked as exhibits. However this did not detract from the fact that SP2 had explained how she arrived at the computation found in P10A and P10B of the column 'Amaun KWH Terkurang Dibil' which is the difference of the amounts found in the columns 'Jumlah KWH Sebenar' and 'Jumlah KWH Dibil'.

[23] The plaintiff did not challenge the accuracy of the calculation made by SP2. Therefore the defendant is liable for the payment of the said sum stated in P10A and P10B. I find support in the case of *Francis Phillips a/l AJ Phillips v Bank Industri Malaysia Bhd* [2004] 2 MLJ 1 p 7 para 15 where the Court of Appeal held:

> In relation to the said sum of RM578,716.64 claimed by respondent against the appellant as reflected in exh P1, we noted that the appellant *did not challenge or question the correctness of that document.* We would agree with the contention of the respondent's counsel that exh P1 is *prima facie evidence of the indebtedness of the appellant and that since no evidence at all had been adduced to vitiate exh P1, by manifest error or otherwise, it is conclusive of the appellant's liability for the amount stated therein.*
>
> (Emphasis added.)

[24] The defendant submitted the plaintiff failed to establish that the digital electrical meter at the defendant's premises was properly calibrated at the time of installation to reflect accurate reading before alleging that the meter in question had not been recording the actual unit of usage. I am of the view that this is not a matter for consideration as it was not part of defendant's pleaded case.

Whether the defendant is liable for the claim

[25] The plaintiff's claim of RM367,711.39 is premised on an offence committed under s 37(3) of the Electricity Supply Act 1990 ('the ESA') which provides:

> Any person who in any manner dishonestly —
>
> (a) abstracts electricity;
>
> (b) consumes electricity;
>
> (c) uses electricity;
>
> (d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or
>
> (e) prevents any such meter or instrument from duly recording the output or consumption of electricity,
>
> shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[26] As to the meaning of 'any person' under s 37(3) of the ESA, I am in agreement with the view expressed by Her Ladyship Hadhariah Syed Ismail JC (now HCJ) in the case of *Tenaga Nasional Bhd v Arkitek Urbanisma Sdn Bhd* [2011] 10 CLJ 796 at p 802 para 13:

> [13] Dengan bantuan peruntukan s 40 di atas, keterangan lisan saksi-saksi perayu beserta bukti-bukti dokumen dan gambar-gambar, suatu kes prima facie di bawah s 37(3) Akta bahawa meter-meter telah diusik oleh responden telah dibuktikan oleh perayu. *Perkataan 'mana-mana orang' di bawah s 37 itu harus diberikan tafsiran yang luas yakni haruslah termasuk pengguna, orang yang mempunyai kawalan ke atas meter dan penghuni premis yang berdaftar dengan perayu. Dalam kes ini responden adalah pengguna yang berdaftar dengan perayu.*
>
> (Emphasis added.)

[27] Recovery of the loss of revenue by the plaintiff from the defendant is made possible vide s 38(3) of the ESA which reads as:

A The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

B **[28]** 'Consumer' is defined under s 2 of the ESA as:

'consumer' means a person who is supplied with electricity or whose premises are for the time being connected for the purpose of supply of electricity by a supply authority or a licensee.

C

[29] Section 38(4) and (5) of the ESA state:

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying —

D (a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof,

shall be prima facie evidence of the payment that has to be made by the consumer under subsection (3).

E (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

[30] In addition to what I have alluded to in paras 11(2) and 11(3) above, in
F my judgment based on (i) s 38(4), P10A and P10B is the written statement of the plaintiff of (a) the amount of the loss of revenue or the expenses incurred by the plaintiff (licensee) and (b) the person liable for the payment thereof, shall be prima facie evidence of the payment that has to be made by the consumer (the defendant) under s 38(3); and (ii) by virtue of s 38(5), the said amount
G shall within the period specified in the written statement stated therein ie 20 January 2000 to 6 January 2005 be due and payable to the licensee and in default of payment be recoverable by civil action in court as is the case here (see *Tenaga Nasional Bhd v Bright Rims Manufacturing Sdn Bhd* [2011] 8 MLJ 455; [2011] 1 LNS 45 at para 51).

H

[31] As I have found there is evidence of tampering, I shall now consider whether there is any merit in the defendant's alternative submission of reliance on the proviso to reg 11 of the Licensee Supply Regulations 1990 ('the regulations') that any retrospective adjustment shall not exceed three months
I from the date the consumer have been informed about being undercharged or overcharged.

The defendant submitted that:

(a) due to the tampering, it resulted in either 'meter inaccuracy' (reg

11(2)(a)) and/or 'incorrect meter reading' (reg 11(2)(c)) and therefore the defendant could not be liable for more than three months consumption of electricity pursuant to the proviso to reg 11(2); and

(b) if accuracy arises out of tampering and it was intended to be excluded, such words as 'meter inaccuracy (other than inaccuracy arising out of tampering)' or 'incorrect meter reading (other than inaccuracy arising out of tampering)' would/must be included in regs 11(2)(a) and/or (c) or the words 'Notwithstanding the proviso to reg 11 of the Regulations' could have been/would have been added to s 38(1) of the ESA.

[32] For ease of reference, reg 11 is reproduced:

> 11 Metering of supplies
>
> (1) The licensee shall provide and fix such meters as it considers necessary for the measurement of the supply of energy to a consumer. Where additional meters are installed by the licensee at the request of the consumer the charge as determined by the licensee shall be paid by the consumer.
>
> (2) The reading of the consumer's meter shall be prima facie evidence of the amount of electricity consumed, provided that in the event a consumer has been undercharged or overcharged as a result of:
>
> (a) meter inaccuracy;
>
> (b) malfunctioning of the meter or its associated installation or part thereof;
>
> (c) incorrect meter reading;
>
> (d) incorrect application of a meter multiplying constant;
>
> (e) cross-connection of installation to different accounts; or
>
> (f) faulty installation,
>
> the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation:
>
> Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged.

[33] With respect, in my humble judgment the defendant's submission is flawed. Regulation 11(2) of the Regulations provides:

(a) The reading of the consumer's meter shall be prima facie evidence of the amount of the electricity consumed.

(b) However if a consumer has been undercharged or overcharged in respect of the amount of electricity consumed as a result of the factors specified in (a) to (f) of reg 11(2), then the licensee shall make retrospective adjustments to the consumer's account in respect of the electricity consumption and demand for such period by taking into consideration the circumstances stated therein to rectify the undercharged or overcharged situation.

(c) It is only under such circumstances that the proviso can be applied.

[34] In any event it has been highlighted to the court by learned counsel for the plaintiff that the Court of Appeal in its broad grounds in the case of *Tenaga Nasional Berhad v Wong Kwi Fong* Mahkamah Rayuan Rayuan Sivil No W-02–2901 of 2010 dated 18 July 2011 (unreported) has held ' Reg 11(2) Licensee Supply Regulations 1990 is not applicable to a case of meter tampering ie an offence under s 37(3) Electricity Supply Act (ESA) and the claim for loss of revenue arising therefrom'.

CONCLUSION

[35] The court has considered the plaintiff's written submission (H), the defendant's submission (I) and the defendant's reply submission (J) and the accompanying authorities For the reasons stated above, I find on a balance of probabilities, the plaintiff has proven its claim. Accordingly, the plaintiff's claim is allowed as follows:

(a) the amount owing in the sum of RM367,711.39;

(b) interest at the rate of 5% on the judgment sum of RM367,711.39 from the date of judgment to the date of full realisation; and

(c) costs fixed at RM10,000.

Plaintiff's claim allowed with costs of RM10,000.

Reported by Ashgar Ali Ali Mohamed